No. 80-1326

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In the Supreme Court of the United States

OCTOBER TERM, 1980

THERESA C. SANDERS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner contends that a bailiff's comment to the jurors during their deliberations coerced the guilty verdict against her (Pet. 7-8), and that the district court erred by not giving, *sua sponte*, a cautionary instruction on the weight to be accorded testimony of an accomplice (Pet. 9-13).

1. Following a jury trial in the United States District Court for the Central District of California, petitioner was convicted of conspiracy, in violation of 18 U.S.C. 371, and theft of mail, in violation of 18 U.S.C. 1708. She was sentenced to concurrent terms of five years' imprisonment on each count; the execution of the sentences was suspended and petitioner was placed on five years' probation and ordered to make restitution in the amount of $5,175.73 (Judgment and Probation/Commitment Order dated Nov. 30, 1979).

The evidence at trial showed that petitioner was a Postal Service employee assigned to the Worldway Postal Center in May 1978. Sometime during that month, petitioner showed her son's common-law wife, Shirley Edwards, a stack of approximately 50 to 100 U.S. Treasury checks, which petitioner said she had taken from her job. Petitioner suggested that Edwards cash the checks and that petitioner and Edwards use the proceeds for bail for petitioner's son, Kenneth Sanders, who was then in jail. Edwards agreed and took several checks. She contacted one Columbus Mackey, who worked at a liquor store; Mackey agreed to cash the checks in return for a portion of the proceeds. Edwards returned to the liquor store on several occasions with additional checks (Tr. 5-7, 15-38).[1]

Edwards testified to these facts at the trial. Mackey also testified and essentially confirmed Edwards' account of the events in which he was involved (Tr. 281-291). Among the other witnesses for the government were Treasury Department and Postal Service employees whose testimony showed that the stolen checks were likely to have been in the Worldway Postal Center on May 20 and 21 (Tr. 111-130, 159) and were left in a place in the Center where they would have been visible to an employee working in the area in which petitioner worked on May 21 (Tr. 159-170, 219-220). A Secret Service Agent testified that petitioner had given inconsistent answers to his questions about, among other things, the source of the money she used for her son's bond (Tr. 326-330).

The jury began deliberations at approximately 11:00 a.m., November 2, 1979. At one point, the trial judge informed the bailiff that he would be dismissing the jury at 4:00 p.m. that day. At about 3:15 p.m., the bailiff relayed this information to the jurors, who asked what would

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[1] "Tr." refers to the Reporter's Partial Transcript of trial proceedings.

happen if they did not reach a verdict by that time. The bailiff responded that they would have to return on Monday (Pet. App. 1). At approximately 3:50 p.m., the bailiff returned to the jury room, apparently to tell the jury that it could deliberate past 4:00. Before he spoke, however, they said that they had reached a verdict. The bailiff responded that more time was available if needed (Tr. 478-479), but the jury returned to the courtroom with its verdict.

Before sentencing, petitioner moved for a new trial based on the bailiff's remarks to the jury. The district court reviewed affidavits and heard argument on the motion (Tr. 477-481). Petitioner acknowledged that there was no intentional wrongdoing by the bailiff (Tr. 477). The court denied the motion for a new trial, holding that the bailiff's "communications went through normal procedure" and did not concern the merits of the case (Tr. 479-480).

The court of appeals affirmed petitioner's conviction (Pet. App. 1-2). It held that the bailiff's comment to the jury "did not require the jurors to surrender views conscientiously held" and "was harmless and non-coercive" (*ibid.*). The court also rejected petitioner's claim that the trial judge erred by not giving a cautionary instruction, *sua sponte*, on accomplice testimony (*id.* at 2).

2. Neither of petitioner's claims merits further review by this Court.

a. On its face, the bailiff's comment contained only a neutral fact—that the court's day would end at 4:00 p.m.—and the truism that if the jury did not complete its work on Friday, it would return on Monday. The bailiff's conveying this information to the jury, while perhaps inappropriate, is not comparable to the manifestly prejudicial or coercive communications that this Court has held to require reversal. The bailiff did not pressure the jury to reach agreement after

it had announced its disagreement, see *Jenkins* v. *United States*, 380 U.S. 445 (1965), disparage the defendant or tell the jury he was guilty, see *Parker* v. *Gladden*, 385 U.S. 363 (1966), or suggest to the jury that any errors it made would be corrected on appeal, see *ibid.* Given the intrinsically innocuous nature of the bailiff's comment, the question whether it prejudiced petitioner was essentially one of fact and was resolved against petitioner by both courts below.

b. There is also no merit to petitioner's claim (Pet. 9-13) that the trial court erred by failing to give a cautionary instruction on accomplice testimony when none was requested. See Fed. R. Crim. P. 30. As the court of appeals observed (Pet. App. 2), Edward's testimony was corroborated in a variety of ways by other evidence at the trial, and the defense explored Edward's motives for testifying, including a plea agreement she had apparently reached with the government (Tr. 53). No case cited by petitioner has held that a *sua sponte* cautionary instruction on accomplice testimony is required in these circumstances.[2] In any event, the question whether the failure to give such an instruction was plain error in this case would depend on an evaluation of the particular facts and is not appropriate for this Court.

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[2]Petitioner relies on *Tillery* v. *United States*, 411 F. 2d 644 (5th Cir. 1969), *United States* v. *Owens*, 460 F. 2d 268 (10th Cir. 1972), and *United States* v. *Waldron*, 568 F. 2d 185 (10th Cir. 1977), cert. denied, 434 U.S. 1080 (1978). In *Tillery*, *supra*, 411 F. 2d at 646-647, the court held that the accomplice's testimony was effectively uncorroborated. *Waldron*, *supra*, 568 F. 2d at 187, held that where there is "a significant amount of other direct and circumstantial evidence implicating" the defendant, it is "not plain error to omit an accomplice or 'interested witness' instruction" and interpreted the earlier Tenth Circuit case, *Owens*, to be consistent with this principle (*ibid.*).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

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